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Defendant.

ORDER

Background

¹ On May 8, 2012, defendant filed one document titled “Defendant’s Objection to Plaintiff’s Proposed Discovery Plan and Request for Stay; Request for Attorneys’ Fees.” On May 11, 2012, the clerk separated the document into two docket entries (#24 and #25) pursuant to Special Order 109.

(#12 and #13). Defendant's motions are fully briefed (#17 and #22) and pending before this court.

On May 4, 2012, plaintiff Andrus filed a proposed discovery plan and scheduling order. (#23). Plaintiff asserts that he filed the discovery plan on his own because defendant D.R. Horton "has determined that its Motion to Compel Arbitration and Stay Proceedings has alleviate[d] the need for a 26(f) conference or the filing of a discovery plan." *Id.* Plaintiff's discovery plan does not limit the scope of discovery permitted. *Id.* On May 8, 2012, defendant D.R. Horton filed an objection to plaintiff's proposed discovery plan and a request for stay and for attorneys' fees. (#24 and #25). On May 23, 2012, plaintiff Andrus filed an opposition. (#26). Defendant filed a reply on May 24, 2012. (#28).

Motion To Stay and Request for Attorneys' Fees

A. Arguments

Defendant D.R. Horton asks this court to stay all pre-trial obligations, including discovery, pending a decision on defendant's motions to compel arbitration (#12) and stay proceedings (#13). (#24). Defendant argues that a stay is warranted, because "[o]nce presented with a motion to compel arbitration, the court's jurisdiction and, in turn, any discovery, is limited only to determining whether the dispute is arbitrable." *Id.* Defendant asserts that courts in the Ninth Circuit regularly stay discovery in similar situations "to ensure that parties seeking to enforce an arbitration agreement are not irreparably harmed by the loss of the advantages of arbitration – speed and efficiency – while the arbitration agreement is still being litigated." *Id.* Defendant asserts that the brief stay will not create any harm or prejudice to either party. *Id.*

Defendant also asks this court to award it \$2,570 in attorneys' fees that it "has been forced to incur" due to plaintiff's "untenable and unsupported position regarding discovery." *Id.* Defendant argues that despite providing plaintiff with legal authority supporting its position that discovery is premature in light of the pending motion to compel arbitration, plaintiff insisted on unilaterally filing his proposed discovery plan and scheduling order. *Id.* If not for the filing of plaintiff's proposed

1 discovery plan, defendant argues that it would not have been forced to file its objection and request for
2 stay. *Id.* Defendant asserts that the fees incurred in connection with filing its responsive pleadings
3 totals \$2,570 (one hour at \$330 per hour and 8 hours at \$280 per hour). *Id.*

4 Plaintiff Andrus asserts that defendant's objection should be overruled, because (1) plaintiff filed
5 the discovery plan and scheduling order in accordance with the federal and local rules, (2) the rules
6 require defendant's participation in a Rule 26(f) conference and joinder in the discovery plan, (3)
7 defendant could have stated its objection to plaintiff's view of discovery in the discovery plan, and (4)
8 if defendant sought a stay of discovery, it needed to file a motion to stay instead of refusing to
9 participate in the filing of the discovery plan. (#26). Plaintiff also asserts that defendant's request for
10 attorneys' fees is "completely without merit," as plaintiff's position regarding the requirement to file
11 a discovery plan and scheduling order under the federal and local rules was not "untenable" or
12 "unsupported." *Id.* Plaintiff argues that there was no automatic stay once the motion to compel
13 arbitration was filed, and that the parties were required to proceed with the action until the court issued
14 its ruling on either the motion to compel arbitration or the motion to stay discovery. *Id.*

15 In reply, defendant asserts that plaintiff did not offer for defendant to add its objection to the
16 discovery plan or provide defendant with a draft copy of the discovery plan prior to filing it with the
17 court. (#28). Defendant also asserts that the language in Rule 26(f) is mandatory only when the court
18 has jurisdiction over discovery, and that since the action is subject to a mandatory arbitration clause,
19 only the arbitrator has jurisdiction over this matter, including discovery. *Id.* Defendant argues that it
20 has demonstrated that "serious and irreparable prejudice" (the loss of the advantages of arbitration) will
21 result if the discovery is not stayed, but that plaintiff has not even argued how he will be prejudiced or
22 harmed if discovery is stayed. *Id.* Defendant reasserts its position regarding attorneys' fees, and asks
23 this court to award attorneys' fees incurred as a result of defendant having to "take additional measures
24 to protect itself with what should have been an unnecessary second request for stay." *Id.*

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B. Relevant Law/Discussion

Federal Rule of Civil Procedure 26(f)(1) states that “the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).” “The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan.” Fed. R. Civ. P. 26(f)(2). The discovery plan must state, among other things, the parties’ views and proposals on “the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues...” Fed. R. Civ. P. 26(f)(3)(B).

While a court is determining the issue of whether an action should be stayed and the parties compelled to arbitrate, “a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.” *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999)(citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); see also *Sparkling v. Hoffman Construction Co.*, 864 F.2d 635, 638 (9th Cir. 1988). “[D]iscovery and a full trial in connection with a motion to compel arbitration” is permitted under 9 U.S. § 4 only if “the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue.” *Id.*; 9 U.S. § 4. To require the parties to proceed with the action pending a ruling on the motion to compel arbitration and any appeal thereof would cause the party seeking to enforce the arbitration clause to be “deprived of the inexpensive and expeditious means by which the parties had agreed to resolve their disputes.” *Alascom, Inc. v. ITT North Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984).

C. Discussion

1. Staying Discovery

Since plaintiff’s discovery plan and scheduling order (#23) did not propose limiting the scope

1 of discovery to matters related to the “making and performance of the agreement to arbitrate,” staying
2 discovery pending a ruling on the motion to compel arbitration (#12) is warranted. *Simula, Inc.*, 175
3 F.3d at 726. If the motion to compel arbitration is granted and the “dispute is arbitrable, responsibility
4 for the conduct of discovery lies with the arbitrators...” *CIGNA Health Care of St. Louis, Inc. v. Kaiser*,
5 294 F.3d 849, 855 (7th Cir.2002) (citing 9 U.S.C. § 7). It is in the interest of conserving the resources
6 of the parties and the court to stay discovery in this action pending a determination of the motion to
7 compel arbitration. *See Mundi v. Union Sec. Life Ins. Co.*, 2007 WL 2385069, at *6 (E.D. Cal.2007)
8 (holding that “the parties should not be required to endure the expense of discovery that ultimately
9 would not be allowed in arbitration”).

10 **2. Attorneys’ Fees**

11 The court finds that awarding attorneys’ fees is not warranted, as defendant did not participate
12 in the Rule 26(f) conference as required by the federal rules and would have needed to file a motion to
13 stay regardless of whether plaintiff unilaterally filed the discovery plan and scheduling order.

14 Pursuant to Rule 26(f), the parties were jointly responsible for arranging a conference in order
15 to confer in a good faith attempt to agree upon and file a discovery plan and scheduling order. Fed. R.
16 Civ. P. 26(f). The parties were required to include in the discovery plan their views and proposals on
17 whether discovery should be conducted in phases or be limited to or focused on particular issues. Fed.
18 R. Civ. P. 26(f)(3)(B). Rule 26, therefore, provided the parties the opportunity to inform the court of
19 their conflicting views on what discovery could be conducted pending the ruling on the motion to
20 compel arbitration (#12). *Id.*

21 As evidenced by the cases defendant cited in support of its position regarding a discovery stay,
22 there is no automatic discovery stay once a motion to compel arbitration is filed. *Coneff v. AT&T Corp.*
23 2007 WL 738612 (W.D. Wash. 2007)(motion for protective order); *Merrill Lynch, Pierce, Fenner, &*
24 *Smith Inc. v. Coors*, 357 F.Supp.2d 1277 (D. Colo. 2004)(motion to stay discovery); *Shappell v.*
25 *Employers’ Holdings, Inc.*, 3:09-cv-00236-RCJ-RAM, Doc #15 (D. Nev. Nov. 11, 2009)(motion to stay

1 all pre-litigation obligations, including discovery); *Stiener v. Apple Computer, Inc.* 2007 WL 4219388
2 *1 (N.D. Cal. Nov. 29, 2007)(motion to stay obligations under initial scheduling order); *Cunningham*
3 *v. Van Ru Credit Corpt.*, 2006 WL 2056576 (E.D. Mich. July 21, 2006)(motion to stay discovery);
4 *Mundi*, 2007 WL 2385069 *1, *2 (motion to stay pending appeal). Defendant was aware that it must
5 first file a motion and have that motion granted before it was relieved of its discovery obligations. *Id.*

6 Accordingly, and for good cause shown,

7 IT IS ORDERED that defendant D.R. Horton, Inc.'s Objection (#24) to Plaintiff's Discovery
8 Plan and Scheduling Order (#23) is OVERRULED.

9 IT IS FURTHER ORDERED that Defendant D.R. Horton, Inc.'s Motion To Stay Discovery
10 (#25) is GRANTED. Discovery in this action is STAYED pending the court ruling on the Motion to
11 Compel Arbitration (#12) and Motion To Stay Proceedings (#13).

12 IT IS FURTHER ORDERED that defendant D.R. Horton, Inc.'s Request for Attorneys' Fees
13 is DENIED.

14 DATED this 1st day of June, 2012.



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16 **CAM FERENBACH**
17 **UNITED STATES MAGISTRATE JUDGE**
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